

No. 10,073

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WESTERN-KNAPP ENGINEERING Co.
(a corporation),

Appellant,

vs.

O. T. GILBANK, Trustee of the Estate
of Jumbo Consolidated Mining Com-
pany (a corporation), Bankrupt,
Appellee.

OPENING BRIEF FOR APPELLANT.

ARTHUR P. SHAPRO,
Russ Building, San Francisco,
Attorney for Appellant.

HAROLD A. BLOCK,
Monadnock Building, San Francisco,
Of Counsel.

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JURISDICTION.

This is an appeal from a portion of that certain Order of the District Court of the United States for the Southern District of California, Central Division, entered in said District Court on the 29th day of December, 1941 (Transcript of Record, pp. 102-105), wherein and whereby said District Court adopted as the Findings of Fact and Conclusions of Law of said Court, the Findings of Fact and Conclusions of Law (T. R. pp. 85-95) of the Referee in Bankruptcy of said Court (as set forth in said Referee's Certificate upon the Petition for Review, filed with said District

Court by Appellant, of that certain Order of said Referee made and entered by him on the 6th day of June, 1941 (T. R. pp. 95-101), wherein and whereby, said District Judge confirmed the said Order of said Referee, in so far as said Referee's Order, and the subsequent Order of the District Judge confirming the same refers and applies to the personal property described in and as "Parcel Two" (T. R. pp. 97-98) of said Referee's Order.

On March 15, 1939, the Jumbo Consolidated Mining Company, a Nevada Corporation, filed with the District Court of the United States for the Southern District of California, Central Division, its Petition under Chapter 11 of the Bankruptcy Act. (Title 11, U. S. C. A., Sec. 202) (T. R. pp. 1-11.) Subsequently the Referee in Bankruptcy, to whom the aforesaid proceedings had been referred, made and entered an Order of Adjudication in Bankruptcy. (T. R. pp. 14-15.)

On November 28, 1940, the appellee (trustee in bankruptcy herein) filed with the Referee in Bankruptcy his "Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien" (T. R. pp. 19-31), naming the appellant herein as one of the respondents to an Order to Show Cause thereon. (T. R. pp. 31-34.) Within the time allowed by law appellant and the other respondent to said Order to Show Cause filed their answer to said Petition (T. R. pp. 35-44) and joined issue on certain points which were thereupon raised by the pleadings hereinabove referred to. Certain hearings

on said Order to Show Cause were had, as a result of which, the Referee made and entered that certain "Order" of June 6, 1941, heretofore referred to.

On July 22, 1941, and within the time allowed by law, appellant filed its "Petition for Review" of said Order (T. R. pp. 68-74), and on December 29, 1941, the District Court made and entered the Order herein appealed from whereby said District Court confirmed a portion of the said Referee's Order, and vacated another portion of said Order. (T. R. pp. 102-105.)

This appeal is prosecuted from that portion of the aforesaid order of the District Court which confirmed and failed to vacate the Referee's Order of June 6, 1941.

The appellate jurisdiction of this Court is invoked under Section 24a of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 47(a)) and General Order in Bankruptcy No. 36.

STATEMENT OF THE CASE.

On May 23, 1938, appellant (as conditional vendor), and bankrupt (as conditional vendee), entered into a Contract of Conditional Sale covering certain mining machinery (described in T. R. pp. 97-99 as "Parcel One", "Parcel Two", and "Parcel Three".) (Finding No. 8; T. R. p. 90.) In this appeal we are solely concerned with the personal property described as "Parcel Two", the correctness of the appellee's position with reference to "Parcels One and Three" hav-

ing been conceded. (T. R. p. 75.) The aforesaid Contract of Conditional Sale was recorded on May 28, 1938, in Book "U" of Agreements, at pages 462 et seq., in the office of the County Recorder of Calaveras County, California. (Finding No. 9; T. R. pp. 90-91.) Said contract was never recorded in any other county. (T. R. p. 91.) The personal property described in "Parcel Two" of said contract was to be situated at the Mt. King Mine, which is located in Calaveras County, California. (Finding No. 6; T. R. p. 89.)

At all of the times herein mentioned the bankrupt was a Nevada Corporation, and was qualified to do business in California. (Finding No. 2; T. R. pp. 85-88.) In the certificate filed with the Secretary of State of the State of California (as required of foreign corporations doing business in this State under Section 405 of the California Civil Code), the bankrupt had designated the County of Los Angeles as the "principal office of the corporation *within* the State of California". (Italics ours; T. R. p. 87.)

THE QUESTION INVOLVED.

The only *question* involved in this appeal is whether *the bankrupt-buyer* (a foreign corporation) *was a "non-resident" of the State of California within the meaning of Section 2980 and related provisions of the California Civil Code* so as to require the recording of the Contract of Conditional Sale in Los Angeles County. (Referee's Certificate, T. R. p. 75;

Order and Memo of District Judge, T. R. pp. 102-105.)

STATUTES INVOLVED.

The pertinent portions of the statutes involved in this case are as follows:

Section 2980, *California Civil Code*:

“Every conditional sales contract * * * of equipment and machinery used or to be used for mining purposes, must be * * * recorded within twenty (20) days after its execution in the office of the recorder of the county where the *buyer* * * * resides at the time he executes such contract * * * or in case the buyer * * * is a non-resident of this State, in the office of the recorder of the county or counties where the property involved is located at the time the contract * * * is executed by the buyer * * * and a contract of conditional sale of equipment and machinery used or to be used for mining purposes shall also be recorded in every case in the county where the property is situated, otherwise, it shall be void as to the lien, or interest of the seller * * * against * * * those having no actual knowledge of the contract * * * who became creditors of the buyer * * * while said property is in the possession of any of the last mentioned parties.

Sections 2959a and 2965 of the Civil Code are hereby made applicable to the instruments required to be recorded by this section in the same manner as to mortgages of personal property.” (Italics ours.)

Section 2959a, *California Civil Code*:

“Where the mortgagor of personal property or crops is a corporation or a partnership the county of residence thereof for the purpose of recording such mortgage shall be deemed to be the county wherein such corporation or partnership has its principal place of business within this state.”

Section 405, *California Civil Code*:

“In this chapter the term ‘foreign corporation’ means a corporation not incorporated under the laws of this state * * *”

“No foreign corporation shall transact intrastate business in this State until it has filed with the Secretary of State a copy of its articles duly certified by the Secretary of State or other official of the government under the laws of which it was created, nor until it has also filed with the Secretary of State a statement setting forth:

(1) The location and address of its principal office;

(2) The location and address of its principal office within this state; * * *

**SPECIFICATION OF ERRORS UPON WHICH
APPELLANT RELIES.**

The appellant specifies as error (T. R. pp. 118-122):

That that portion of that certain ORDER OF said DISTRICT JUDGE, ENTERED in said District Court ON THE 29TH DAY OF DECEMBER,

1941 (T. R. pp. 102-105), wherein and whereby said District Court adopted as the Findings of Fact and Conclusions of Law of said Court, the Findings of Fact and Conclusions of Law (T. R. pp. 85-95) of the Hon. Hugh L. Dickson, Referee in Bankruptcy of said Court (as set forth in said Referee's Certificate upon the Petition for Review filed with said District Court by Appellant from that certain Order of said Referee made and entered by him on the 6th day of June, 1941), and WHEREIN AND WHEREBY, and to the extent that, by said Order, SAID DISTRICT JUDGE CONFIRMED THE said ORDER OF said REFEREE DATED the said 6TH DAY OF JUNE, 1941 (T. R. pp. 95-101), all IN SO FAR AS SAID REFEREE'S ORDER, and the subsequent Order of the District Judge confirming same (hereinafter referred to as the "Order herein appealed from") refers and APPLIES TO THE PERSONAL PROPERTY DESCRIBED in and as "PARCEL TWO" OF SAID REFEREE'S ORDER, was and is erroneous and contrary to law, in that

(a) Said Order herein appealed from is not supported by, and is contrary to the evidence adduced by Appellant and by Appellee upon the hearing before said Referee of said Appellee's 'Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien' (T. R. pp. 19-31);

(b) That the evidence adduced by Appellee in support of his said Petition was and is insufficient to

warrant the relief therein prayed for and/or thereafter granted to Appellee by the aforesaid Referee's Order and by the Order herein appealed from (with respect to the said Personal property described as 'Exhibit 2');

(c) That the aforesaid evidence so adduced by Appellant and Appellee upon the hearing by said Referee of said Appellee's Petition shows affirmatively, and without contradiction, that the Bankrupt, Jumbo Consolidated Mining Company, a corporation, was at all of the times therein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and at all times since on or about the 1st day of September, 1937, was qualified to and did carry on business, as such foreign corporation, in the State of California, and that by reason of the premises and all of the evidence so adduced upon the issues so raised by Appellant's answer to Appellee's 'Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien', SAID BANKRUPT WAS, AT THE TIME OF THE EXECUTION OF THE CONTRACT OF CONDITIONAL SALE BETWEEN SAID BANKRUPT AND APPELLANT, DATED MAY 23, 1938, and of the Supplemental Agreement on Conditional Sale, likewise between said parties, and of even date therewith, a FOREIGN CORPORATION AND A NONRESIDENT OF THE STATE OF CALIFORNIA WITHIN THE MEANING OF SECTION 2980 OF THE CIVIL CODE OF CALIFORNIA;

(d) That the evidence so adduced by the respective parties upon the aforesaid issues, likewise by reason of the premises, shows affirmatively that the aforesaid and above described Contract of Conditional Sale and Supplemental Agreement thereon, between said Bankrupt and Appellant, were properly and timely and duly recorded in compliance and in accordance with the provisions of the aforesaid Section 2980 of the Civil Code of California; and that, in all respects, said Contract of Conditional Sale and all of the rights and privileges therein granted to Appellant were and are valid, enforceable and subsisting, both as against said Bankrupt, and as against Appellee herein (the Trustee of said Bankrupt's estate);

(e) That at none of the times hereinabove or in said Appellee's 'Petition to Recover Assets Fraudulently or Preferentially Transferred by Bankrupt and to Avoid Lien' mentioned, was said Bankrupt (the conditional vendee of the personal property described as 'Exhibit 2' thereof) a 'resident' of the County of Los Angeles, State of California, as that term is used in said Section 2980 of said Civil Code, so as to require the recordation of said Contract of Conditional Sale between said Bankrupt and Appellant in the said County of Los Angeles.

ARGUMENT.

I.

SECTION 2980 OF THE CALIFORNIA CIVIL CODE MAKES DIFFERENT RECORDATION REQUIREMENTS FOR "RESIDENTS" AND FOR "NON-RESIDENTS".

Paraphrasing the code section involved, we see:

A. If the conditional buyer is a *resident*, the contract must be recorded in the "office of the recorder of the county where the buyer * * * resides" at the time he executes the contract. Such contract must *also* be recorded in the county where the property is "situated", when the contract, as here, involves "equipment and machinery used or to be used for mining purposes".

B. If the conditional buyer is a *non-resident*, the contract must be recorded "in the county or counties where the property involved is *located* at the time the contract is * * * executed by the buyer".

It is of no importance here for us to determine why the legislature made different requirements for residents and non-residents. The fact is that the requirements are different. In the instant case, the conditional sales contract involved was recorded where the property involved was located at the time the contract was executed; it was not recorded where the buyer had its purported "residence" within the State of California, to-wit: in Los Angeles County.

If the bankrupt-buyer was a "resident" of this State within the meaning of the requirements set forth in Section 2980 of the Civil Code for "residents", then the contract was improperly recorded,

and this appeal must fail. On the other hand, if the bankrupt-buyer was a "non-resident" of this state within the requirements of said code section, the contract was properly recorded in Calaveras County, and the Order herein appealed from should be reversed.

II.

WITHIN THE MEANING OF SECTION 2980 OF THE CALIFORNIA CIVIL CODE THE BANKRUPT-BUYER WAS A "NON-RESIDENT".

A. THERE ARE NO CALIFORNIA CASES INTERPRETING THIS POINT.

So far as we have been able to determine, this is a case of first impression both in the Federal Courts and in the Courts of the State of California. There are no cases deciding whether a *foreign* corporation is a "resident" or "non-resident" within the meaning of this code section.

Nor are there any cases involving a similar determination of that question under the related Section 2959a of the Civil Code. *Matter of A & B Oil Co.*, 95 F. (2d) 946, is as close a *California* case as we have been able to find, but that case holds that so far as a *domestic corporation* is concerned, it is a resident of the County of its designated principal place of business within the meaning of Section 2959a of the California Civil Code. Under the doctrine of this case, we must concede that if the bankrupt-buyer had been a *California* corporation rather than a *Nevada* corporation, the recordation herein could not

legally be supported. The point is, however, that we here have the problem of where the proper recordation (under Section 2980, Civil Code) must be made when the buyer is a *foreign* corporation.

B. SIMILAR STATUTES IN OTHER STATES HAVE BEEN INTERPRETED BY THE FEDERAL COURTS TO HOLD THAT A FOREIGN CORPORATION IS ALWAYS A "NON-RESIDENT" WITHIN THE MEANING OF SUCH RECORDING STATUTES.

In New Hampshire the conditional sales recording statute (Pub. Laws, N. H. 1926, c. 216, Secs. 27, 28, 30) requires a memorandum of the contract "to be recorded in the town clerk's office of the town:

I. Where the purchaser resides, if within this state; or

II. Where the vendor resides, if within this state; or

III. *Where the property is situated if neither purchaser or vendor resides in the State.*" (Italics ours.)

In a case which involved a corporation organized under the laws of the State of Maine (as seller) and a corporation organized under the laws of New York, but licensed to do business in New Hampshire, and having filed its requisite certificate designating its "principal place of business in New Hampshire", as in Berlin, New Hampshire (as buyer), the question arose as to whether proper recordation of the contract would be under the first, second, or third alternative provided in the above-quoted statute. The court held that recordation must be made under the *third*

alternative, as "neither the purchaser or vendor resides in the State". *Babcock & Wilcox Co. v. Spaulding* (1936, C. C. A. 1st), 86 F. (2d) 256.

The facts of the case were: Cameron Company, a New York Corporation, as conditional vendor, sold certain personal property under a conditional sales contract to Brown Company, a Maine Corporation. Brown Company was licensed to do business in New Hampshire, and had designated its principal place of business in New Hampshire, as in the town of Berlin, New Hampshire. At the time of the execution of the conditional sales contract, the property described therein was located in the town of Gorham, New Hampshire. Cameron Company had only recorded the contract in Berlin, the county where the Brown Company had designated in its certificate as "its principal place of business within this State" (i.e., New Hampshire).

Subsequently, Brown Company was adjudicated bankrupt. When the Cameron Company attempted to repossess the property covered by the contract, the trustee contended that both vendor and vendee were "non-residents" and the contract should have been recorded in accordance with the third requirement of the statute, and that the lien of the vendor must fail.

The Referee in Bankruptcy and the District Court each upheld the trustee's position. (See *In re Brown Co.* (1936), 14 F. Supp. 251.) The Circuit Court of Appeals *affirmed* this decision. In so doing, it said (p. 257 et seq.):

“Under these provisions of law the validity of the Cameron Company’s lien depends upon whether the Brown Company *resided* in Berlin. If it did, the memorandum could be properly recorded there. If both the Brown Company and the Cameron Company resided out of the state, the memorandum should have been recorded in Gorham where the property was situated. It was not recorded in Gorham, but in Berlin, and was properly recorded there only in case the Brown Company had a residence in Berlin. Did the Brown Company, a corporation, organized under the laws of Maine, have a residence in Berlin, New Hampshire? Undoubtedly an individual domiciled in Maine can acquire a temporary residence in New Hampshire sufficient to make a lien valid if the memorandum of conditional sale is there recorded. But as to a corporation the situation is different.

A corporation ‘cannot migrate’. *Baltimore & O. Railroad Company v. Harris*, 12 Wall. 65, 81, 20 L. Ed. 354. It is generally held in this country, and particularly *in the federal courts, that a corporation’s residence is in the state of its incorporation ‘and can be nowhere else’.*” (Italics ours.)

The Court cited with approval the following language contained in *Germania Fire Insurance Company v. Francis*, 11 Wall. 210, 216, 20 L. Ed. 77, to-wit (p. 258 of *Spaulding* case, *supra*):

“* * * a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it can-

not change its domicile at will, and, although it may be permitted to transact business where its charter does not operate it *cannot* on that account *acquire a residence there.*" (Italics ours.)

And in referring to the case of *In re Schollinberger*, 96 U. S. 369, 377, 24 L. Ed. 853, the Court quoted this language (p. 258 of *Spaulding* case, *supra*):

"A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter. See, also, *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 10 L. Ed. 274; *Baltimore & Ohio Railroad v. Koontz*, 104 U. S. 5, 11, 26 L. Ed. 643; *Fairbanks Steam Shovel Co. v. Wells*, 240 U. S. 642, 647, 36 S. C. 466, 60 L. Ed. 841; and the long list of cases in 14a, C. J. 1224, note 94."

The District Court's opinion in this matter contains additional legal reasoning and authority, the pertinent parts of which are quoted below (*In re Brown*, *supra*, at 253):

"The purchaser here, Brown Company, was a Maine corporation located and having its principal place of business in Maine. It was a non-resident of New Hampshire, and had filed a certificate to that effect in New Hampshire. *The fact that it did a large part of its manufacturing business in New Hampshire is not controlling.*"

"The residence of a corporation must be in the State which incorporated it, so that in any other State it is a non-resident, and the statute, requiring mortgages by non-residents to be recorded in the town where the property is, ap-

plies and must be enforced.” *Jones on Chattel Mortgages and Conditional Sales*, Sec. 253.

“* * * I consider that the New Hampshire statute, in using the words ‘where the purchaser * * * or vendor resides’, in the case of a corporation, refers to a New Hampshire corporation, and that a *corporation foreign to New Hampshire must be regarded as having* a foreign residence, within the state that is referred to by the statute.” (Italics ours.)

The case of *Whitney v. Browne* (1902), 180 Mass. 597, 62 N. E. 979 (which is “very much in point” according to the District Court’s opinion in *In re Brown Co.*, supra), holds that where a statute requires a “non-resident’s mortgage” to be recorded where the property is located, the failure of a foreign corporation to so record is fatal, even though the foreign corporation has filed the requisite certificate designating its principal place of business in Massachusetts.

And in *Ward v. Southern Sand & Gravel Co.* (1929) (U.S.D.C.N.C.), 33 F. (2d) 773, the bankrupt-buyer was a Delaware corporation, which had designated as its principal place of business in North Carolina “Sanford, Lee County, North Carolina”. The conditional vendor had recorded in Lee County. At the time the contract was executed, the property was located in Harnett County.

“Section 3312 of the Consolidated Statutes, N. C., requires all conditional sales of personal property to be registered in the same manner and with the same legal effect as is provided for

chattel mortgages in the county *where the purchaser resides, or in case the purchaser shall reside out of the state, then in the county where the personal estate of some part thereof is situated.*" (Italics ours.)

The Court held that the contract had been recorded in the wrong county, since the conditional vendor was *not* a "resident".

The Court said (p. 774):

"The compliance by a foreign corporation with the requirements of C. S. Sec. 1181* *does not make the foreign corporation a resident of the State, or of the county where its principal office is located* for the purposes of C. S. Secs. 3311 and 3312. This statute is nothing more than a license to do business in North Carolina. * * * The chief purposes of this provision were to enable a litigant to obtain service of process on the foreign corporation in this state, and incidentally to collect a tax on the foreign corporation for the privilege of transacting business in this state.

A corporation can have no legal existence outside of the boundaries of the sovereign by which it is created. It has its domicile in the state which created it, and it cannot acquire a domicile in another state, although it may have an office and do business there (Citing cases.) and for the same reason *a corporation cannot be a resident of another state than that in which it is created. Such is the uniform construction of states in which the term 'resident' or 'non-resi-*

*This section is practically identical with Section 405 of the California Civil Code.

*dent' is used, where the question is presented whether a foreign corporation is included in the term. See cases cited in Clark on Corporations (2d. Ed.), p. 67. * * **"

"The facts in our case are practically the same as those in the case of *Whitney v. Browne*, 180 Mass. 507, 62 N. E. 979. * * *" (Italics ours.)

Section 2980 of the Civil Code requires "resident" buyers to record in the *county of their residence*, and "non-resident" buyers to record only in the *county in which the property involved is located at the time of the execution of the contract*.

With respect to making different requirements for the recordation of such contracts by "residents" and "non-residents", the California statute and the New Hampshire and North Carolina statutes are, in all respects, analogous. Consequently, if in New Hampshire, or North Carolina, a foreign corporation which has its "principal place of business" in that state in a particular county is, nevertheless, a "non-resident" of that State for the purposes of meeting the recording requirements of the New Hampshire or of the North Carolina statute, it follows that a foreign corporation having its designated principal place of business in California in a particular county within this state is also a "non-resident" within the meaning of the California Civil Code Section 2980.

CONCLUSION.

The California Legislature has set forth in Section 2980 of the Civil Code one method of recording certain types of conditional sales contracts where the buyer is a "resident", and another means of recordation where the buyer is a "non-resident". We have seen that the Federal Courts, in interpreting the recording statutes of other states requiring one method of recording a contract when the buyer is a "resident", and another method when the buyer is a "non-resident" have always held that a foreign corporation is a "non-resident" within the meaning of such statutes. Unquestionably, then, the Federal Courts should interpret the provisions of Section 2980 of the Civil Code of the State of California in a similar manner and hold that a foreign corporation must necessarily always be a "non-resident" within the meaning of this statute.

In the case at bar the Referee and District Judge by their respective orders held invalid, as against appellee-trustee, appellant's contract of conditional sale, solely by reason of their conclusion that the contract in question was improperly recorded because they found that the bankrupt buyer, a Nevada corporation, was, nevertheless, a "resident" of the State of California within the meaning of Section 2980, Civil Code. It is obvious, therefore, that the District Court erred, because, as we have demonstrated clearly above, the Nevada corporation (bankrupt-buyer) could not possibly be anything but a "non-resident" within the meaning of Section 2980 of the Civil Code.

It is therefore respectfully submitted that the Order of the District Court made on December 29, 1941, should be, by this Court, reversed, with instruction to said District Court to enter an Order denying the Trustee's petition to recover assets and to grant to the appellant the relief prayed for in the answer thereto.

Dated, San Francisco,
April 20, 1942.

Respectfully submitted,
ARTHUR P. SHAPRO,
Attorney for Appellant.

HAROLD A. BLOCK,
Of Counsel.